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No. 88-1431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FERDINAND MARCOS, IMELDA MARCOS, AND RAMON AZURIN,

Petitioners,

v.

REPUBLIC OF THE PHILIPPINES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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Petitioners Ferdinand E. Marcos, Imelda R. Marcos, and Ramon Azurin hereby submit this reply to the opposition brief filed by the Republic of the Philippines on March 31, 1989.

ARGUMENT

I. Petitioners Did not Acquiesce in the Issuance of the Injunction by the District Court

The opposition brief of the Republic of the Philippines contains a number of statements which do not accurately reflect the record in this case. The most glaring of these is a misleading quotation from petitioners' reply brief. Specifically, the Philippines urges that the Marcoses "explicitly stated that they 'would not object to a preservation of the *status quo* of the assets covered by the injunction in this case . . .' " Opp. at 3. The full text of the sentence from petitioners' appellate reply brief demonstrates that petitioners were not agreeing that the injunction caused them no hardship or was properly issued,

but rather were bolstering their *forum non conveniens* argument by offering to preserve the Philippines' right to recover assets allegedly purchased with tainted funds while litigation in the Philippines proceeded:

> Appellants would not object to a preservation of the *status quo* of the assets covered by the injunction in this case, as in the others in New York, New Jersey, Switzerland and Los Angeles, as long as the issues of ownership were tried in the forum designated by Appellee itself, namely, the Philippines.

Marcos Reply Brief at 6. As the continuation of this litigation in U.S. courts suggests, the Philippines has not accepted petitioners' offer.

II. Whether the Marcoses Introduced Evidence of Acts of State is Irrelevant, as the Complaint Itself Demonstrates the Applicability of the Act of State Doctrine

The Philippines creates a further erroneous impression by emphasizing that the Marcoses presented no evidence of acts of state at the hearing before the District Court. *See* Opp. at 7, 8, 11. In the absence of such evidence, the Philippines contends that certiorari is not justified, or at least premature. Opp. at 8, 11.

The Philippines' argument ignores the extent to which the act of state doctrine is implicated by the allegations of the complaint itself, thereby obviating the need for proof by the Marcoses of specific acts of state. As explained in the original panel opinion, the Philippines has not attempted to prove specific misdeeds and tie them to specific pieces of property. Instead, the Philippines has submitted hearsay evidence suggesting that the Marcoses acquired assets during their tenure in office not explicable by their salaries as government officials. *See* Appendix at 46-47a.

The Philippines' complaint alleges that these alleged assets must have come through a variety of methods, including the receipt of kickbacks and bribes in exchange for the granting of government favors and the expropria-

tion of private property. The Marcoses introduced no contrary evidence in response to these allegations, since the allegations themselves are nonjusticiable under the act of state doctrine. Specifically, the original panel decision, as well as other Court of Appeals decisions, have held that U.S. courts should not inquire into the motivations of foreign government officials in exercising their official powers. *See Occidental Petroleum v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 110 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir.), *cert. denied*, 464 U.S. 849 (1983); *Clayco Petroleum v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Hunt v. Mobil Oil Co.*, 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1978). Since the Philippines has not contested that the conferring of official monopolies and the expropriation of private property represent officials acts, judicial scrutiny of the reasons underlying such acts is barred by the act of state doctrine, under this line of cases.[1] Other Circuits hold competing views, *see, e.g., Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3rd Cir. 1988), *petition for cert. filed* (No. 87-2066), thus justifying certiorari to resolve the conflict.

III. Construction of the Act of State Doctrine is Ripe For Determination

Since the complaint itself raises act of state doctrine issues, delaying consideration of the applicability of the

[1] While other acts alleged in the complaint to represent the source of the Marcoses' assets may not constitute acts of state, these acts cannot alone justify the preliminary injunction entered by the District Court. As pointed out by the original panel, the Philippines' net worth theory (and the possibility of success on the merits) fails completely if the Marcoses can demonstrate that some of their assets were acquired legally or through methods which cannot be adjudicated by U.S. courts. (47-48a). A judicial determination that any one act alleged in the complaint is nonjusticiable under the act of state doctrine therefore dooms the entire complaint.

act of state until after discovery and final adjudication in this case is fundamentally inconsistent with the goal of the act of state doctrine of avoiding embarrassment of the U.S. government's management of foreign relations; judicially-sponsored investigation into the motivations of the conduct of foreign government is likely as offensive to foreign sensibilities as the determination whether such motivations were proper. Moreover, since the Philippines has not indicated any intention to abandon reliance on a net worth theory as the case progresses, act of state concerns will continue to permeate this case. Certiorari is therefore appropriate at this interlocutory juncture.

CONCLUSION

For the reasons set forth above and in the petition for certiorari, petitioners request that the Court grant certiorari to review the order and judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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